Lian Kian Boon v Public Prosecutor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 41-18 OF 1989
RICHARD TALALLA JC
7 MAY 1990

Criminal Procedure — Plea of guilt — Statement of facts read by the prosecution — What facts should be adduced by the prosecution

Criminal Procedure — Plea of mitigation — Prosecution's right of reply — What reply should deal with

Criminal Procedure — Sentencing — Factors to be considered or disregarded in computing sentence — Original charge, facts of the case

Criminal Procedure — Sentencing — Young offenders — Sentence of imprisonment — Whether a probation report should be called for

The appellant pleaded guilty to voluntarily causing hurt by means of a knife. The prosecuting officer stated that the victim had left a restaurant followed by the appellant and three others. A fight had ensued in which the victim ran away. He was pursued and caught by the appellant who stabbed him in the back and on the face. The appellant admitted these facts.

His counsel then made a plea of mitigation. The appellant was 18 years at the time of the offence and had no previous convictions. The prosecuting officer replied and stated that the appellant was involved in a secret society and this incident was a gang fight in which there had been a fatality. The appellant was sentenced to 12 months' imprisonment from date of conviction.

In his grounds of judgment, the magistrate stated that the accused had originally been charged with three others for murder. He referred to the injuries of the victim which by reference to the medical report he found to be serious. He found that the appellant had started the fight, that he had no respect for the law and that there was a preconceived plan to cause hurt. As it was a fight between secret society members, the court had to take a serious view. The magistrate declined to call for a probation report although the appellant was below 21 years of age as it was not compulsory and as the incident involved a death he felt a weighty sentence was appropriate.

Held, allowing the appeal against sentence:

(1) The prosecution should only state facts that they are able to prove and it should be limited to the facts necessary to establish the charge.

(2) After the mitigation it is reasonable and usual for the prosecution to reply, but it should be limited to points raised in mitigation. No controversial facts should be referred to in the reply.

(3) No controversial facts should be taken into consideration in the matter of sentencing. The only facts which can be considered are facts relevant to the charge or which have been admitted by the accused.

(4) The magistrate should have disregarded anything connected with the original charge. The original charge was amended and should be taken to have been withdrawn and the appellant treated as being wholly innocent of it.

(5) The comments made by the prosecuting officer had an effect on the mind of the magistrate in this case.

(6) There was no factual basis for the magistrate to find that the fight was started by the appellant or that there was a preconceived plan to cause hurt to the victim.

(7) In the case of a person of a young age who is liable to be sentenced to a term of imprisonment, it is always desirable that a probation report on him be obtained.

(8) In the circumstances of this case, 12 months' imprisonment is not manifestly excessive.

(9) In the ordinary course of events the accused's period in remand should be taken into consideration in computing a sentence of imprisonment.

(10) The term of imprisonment should be set aside and be substituted with a bond under s 294 for $5,000 with two sureties for two years.

[Bahasa Malaysia summary

Perayu mengaku bersalah untuk kesalahan menyebabkan kecederaan secara sukarela dengan menggunakan pisau. Pegawai pendakwa menyatakan bahawa perayu dan tiga orang yang lain telah mengikut mangsa setelah mangsa itu meninggalkan sebuah restoran. Pergaduhan berlaku dan mangsa telah berlari untuk melepaskan diri. Mangsa telah dikejar dan ditangkap oleh perayu. Perayu telah menikam mangsa itu di belakang dan mukanya. Kesemua fakta ini diakui oleh perayu. Peguam perayu kemudian membuat rayuan untuk meringankan hukuman. Perayu berumur 18 tahun semasa kesalahan dilakukan dan dia tidak pernah disabitkan sebelum ini. Pegawai pendakwa menjawab bahawa perayu adalah terlibat dalam sebuah kongsi gelap dan kejadian ini merupakan satu pergaduhan antara kumpulan dan telah mengakibatkan kehilangan satu nyawa. Perayu dihukum penjara 12 bulan dari tarikh dia disabitkan.

Di dalam alasan penghakimannya, majistret telah menyatakan bahawa perayu dan tiga orang yang lain pada mulanya telah dituduh untuk kesalahan membunuh. Majistret juga merujuk kepada lapuran perubatan mangsa dan mendapati bahawa kecederaan yang dialami oleh mangsa agak parah. Majistret juga berpendapat bahawa perayulah yang memulakan pergaduhan, bahawa perayu tidak menghormati undang-undang dan terdapat rancangan sebelum itu untuk menyebabkan kecederaan. Oleh sebab ini merupakan pergaduhan di antara kongsi-kongsi gelap, mahkamah harus mengambil berat tentang perkara ini. Majistret enggan memanggil lapuran akhlak kerana ia tidak diwajibkan sungguhpun perayu berumur di bawah 21 tahun. Oleh kerana terdapat kehilangan nyawa di dalam kejadian ini, majistret berpendapat bahawa satu hukuman yang berat adalah berpatutan.

Diputuskan, membenarkan rayuan terhadap hukuman:

(1) Pihak pendakwa hanya perlu menyatakan fakta yang boleh dibuktikan dan ini harus dihadkan kepada fakta yang diperlukan untuk membuktikan tuduhan.

(2) Selepas rayuan untuk meringankan hukuman dibuat, adalah merupakan satu kebiasaan untuk pihak pendakwa untuk menjawab. Tetapi ini mesti dihadkan kepada perkara yang ditimbulkan di dalam rayuan untuk meringankan hukuman sahaja. Fakta yang kontroversial tidak seharusnya dirujuk di dalam jawapan.

(3) Fakta-fakta yang kontroversial tidak sepatutnya diambilkira dalam menentukan hukuman. Fakta-fakta yang boleh diambilkira adalah fakta-fakta yang relevan kepada tuduhan atau yang telah diakui oleh tertuduh sahaja.

(4) Majistret sepatutnya tidak mengendahkan apa-apa yang berkaitan dengan tuduhan asal. Tuduhan asal telah dipinda dan harus dianggap sebagai telah ditarik balik dan perayu dianggap sebagai tidak bersalah atas tuduhan itu.

(5) Komen yang dibuat oleh pgawai pendakwa mempunyai kesan ke atas fikiran majistret di dalam kes ini.

(6) Tidak terdapat asas fakta yang menyokong pendapat oleh magistret yang menyatakan bahawa perayu memulakan pergaduhan atau terdapat satu rancangan untuk mencederakan mangsa.

(7) Di dalam kes yang melibatkan seorang remaja yang boleh dihukum penjara, adalah baik jika satu lapuran akhlak didapati.

(8) Dalam keadaan kes ini, penjara selama 12 bulan bukanlah terlalu berat.

(9) Dalam keadaan biasa tempoh yang tertuduh berada dalam tahanan perlu diambilkira dalam menentukan satu hukuman penjara.

(10) Tempoh penjara perlu diketepikan dan digantikan dengan satu bon di bawah s 294 untuk $5,000 dengan dua penjamin untuk dua tahun.]

Cases referred to

1 *New Tuck Shen* v *PP* [1982] 1 MLJ 27 (folld)
2 *R* v *Campbell* (1911) 6 Cr App Rep 131 (folld)
3 *R* v *Burton* (1941) 28 Cr App Rep 89 (folld)
4 *R* v *Van Pelz* [1943] 1 All ER 36 (folld)
5 *Tukiran bin Taib* v *PP* [1955] MLJ 24 (refd)
6 *Teh Yew Whatt* v *PP* [1958] MLJ 171 (refd)
7 *Tan Kah Eng* v *PP* [1965] 2 MLJ 272 (refd)
8 *Lim Yoon Fah* v *PP* [1971] 1 MLJ 37 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 176(ii)(r), 294

Pang Hok Liong for the appellant.
Tan Poh Lai (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Richard Talalla JC: The appellant was charged before the learned magistrate, Segamat with having on 2 September 1988 at about 11.45pm at Jalan Bayan, Taman Sentosa, Labis, in the district of Segamat, in the state of Johore, voluntarily caused hurt to one Lim Ah Joo by means of a knife, an instrument for stabbing, which was likely to cause death, punishable under s 324 of the Penal Code (FMS Cap 45) which section provides for sentence of imprisonment which may extend to three years or whipping or both. The appellant pleaded guilty to the charge.

The prosecuting officer produced a statement of the facts of the case which is translated by me as follows:

> On 2 September 1988 at about 11.50pm, the complainant, Constable 98211, Ahmad bin Embi, who was attached to the Enquiry Office, was informed by a member of the public that there was a fight at Taman Sentosa, Labis. The complainant made a first report as stated in Labis Report 1860/88.
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> Police investigation revealed that on 2 September 1988 at about 11.45pm, Lim Ah Joo together with three of his friends came out from Elegance Restaurant, No 89, Taman Sentosa, Labis. Lian Kian Boon I/C A 1575172 together with four of his friends followed them. A fight took place when Lim Ah Joo ran away. When they reached Jalan Bayan, Taman Sentosa, Lian Kian Boon who was chasing, stabbed Lim Ah Joo on his back and his face with a knife. Lim Ah Joo received treatment at the Segamat District Hospital.
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> The result of the investigation revealed that Lian Kian Boon had intended to cause injury on Lim Ah Joo with the use of a knife which can cause death.
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> Lian Kian Boon was charged under s 324 of the Penal Code and pleaded guilty to the charge.

These facts were admitted as being true.

Counsel for the appellant then made a plea in mitigation which I translate as follows:

> At the time of the incident the accused was 18 years old. He went to school reaching Form 1 — and worked in Singapore as a mosaic trainee — after that the accused was yet to obtain employment. His family — his parents worked as 'hawkers'. There are eight brothers and sisters — and two younger members are still schooling. In the fight the accused was punched a few times by the complainant, and this is the first time the accused was charged in court. After the incident the accused surrendered to the police — he was not arrested by the police.
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> After that the accused became remorseful or after that incident. I appeal to the court to permit the accused another chance. Appeal to the court to pass a 'non-custodial' sentence — accused only 18 years old.

The prosecuting officer then replied and I translate as follows:

> Accused is charged under s 324 — police investigation revealed that the accused was involved in secret society — and in this incident also had caused the death of Lim Ah Joo's friend which was as a result of a gang fight.
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> Notwithstanding that the accused had no previous conviction — I appeal to the court to pass a sentence to demonstrate that this is quite a serious incident and so that the accused would realize the same.

The learned magistrate then found the appellant guilty, convicted him and sentenced him to 12 months' imprisonment from the date of conviction. The appellant now appeals against sentence.

In his grounds of judgment the learned magistrate stated that the appellant was charged with three others then at large with the murder of one Chin Kuan Yew on 2 September 1988 at about 11.45pm at Jalan Bayan aforesaid. The learned magistrate then referred to an amended charge which is in fact the charge the subject matter of this appeal. He referred to the injuries of Lim Ah Joo which by reference to the medical report he found to be serious. The medical report which was produced by the prosecuting officer spoke to assault by a sharp object resulting in five lacerated wounds of

which two were to the face and three to the upper back. There was a 3cm edge shape wound to the right cheek and a 1cm laceration to the right chin. The three wounds to the back were 2 cm each, sharp edge with 2 to 4cm depth. There was no surgical emphysema, no injury to the pneumothorax and no loss of consciousness. The patient was admitted and discharged well, on the same day which was 3 of September 1988.

Next the learned magistrate said that the actions of the appellant and his friends who were then still free were the actions of persons who did not have respect for the law of this country because they were not afraid to act, as they did in this case, at a public place, namely, outside a restaurant, that there was a preconceived plan showing intention on behalf of the appellant and his friends to cause injury to the complainant. This, said the learned magistrate, was evidenced by the fact that notwithstanding that the complainant ran away the appellant chased and stabbed him.

The learned magistrate then referred to counsel's plea that it was the complainant who assaulted the appellant and that he the appellant acted reasonably in self defence. To this, the learned magistrate declared that it was clear from the facts as admitted by the appellant that it was the appellant who started the fight.

The next point the learned magistrate referred to was, so he said, the evidence on the part of the prosecuting officer himself, that the fight was one between secret society members which showed how serious the matter was and in respect of which the court had to take a serious view, in the public interest. The learned magistrate then said that it was known that the area in which the incident happened was one where there was much secret society activity and that if the court did not give weighty consideration it would be failing in its duty to administer justice.

Lastly, the learned magistrate said that although the appellant was below 21 years of age, there was no need for a probation report because such was not compulsory, that such a report was only necessary in certain situations and that in this case because the offence committed involved a death, even though the appellant was not involved in the incident, the court was of the view that a weighty and appropriate sentence to the offence committed should be imposed.

It is provided in s 173(b) of the Code that if the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. In the same section, see sub-s(m)(2), it is stated, inter alia, that if a plea of guilty has been recorded and accepted, the court shall pass sentence according to law. Nowhere in the Code can I find any provision for facts of the case to be given by the prosecution as was done by the prosecuting officer in this case. However, I do understand that it is the practice to do so. See *New Tuck Shen* v *PP*[1] where Wan Yahya J spoke of it being the accepted practice of our court for the prosecution to outline the facts of the case on a plea of guilty to the charge. That being the practice, it seems to me nonetheless that the facts stated should be limited to facts which the prosecution are able to prove and then only to facts necessary to establish the charge. These facts will be put by the court to the accused who will be asked whether he admits them. It is only then that the court will decide whether or not to accept the plea of guilty.

Upon the court accepting the plea of guilty and convicting the accused, the accused will be given an opportunity to be heard in mitigation of sentence. Once again there is no express provision in the Code for such a plea except indirectly where by s 176(ii)(r) there is provision for the court's note on a plea in mitigation to be kept as a record, including such a note on previous convictions and evidence of character.

A plea in mitigation having been made it is reasonable and I believe usual for the prosecution to reply, notwithstanding that yet again there is no provision in the Code for such reply. This reply to my mind should be limited to matters raised in the plea in mitigation. In my view no controversial facts should be referred to in the reply or taken into consideration in the matter of sentencing. The only facts which can be considered, it seems to me, are facts relevant to the charge or which have been admitted by the accused.

In this regard there is the case of *R* v *Campbell*.[2] There the prisoner was convicted of obtaining money by false pretences and was sentenced to three years penal servitude. Counsel for the prisoner who had been refused leave to appeal against sentence, asked the Court of Criminal Appeal to give a ruling as to the propriety of the practice of police officers giving hearsay evidence after conviction, with a view to the increase of sentence. Alverstone CJ commented at p 132:

> We have been asked to say something about the practice of police officers giving the judge the result of their enquiries about prisoners. In ordinary circumstances we should not accede to such a request, but as the matter has recently been under the consideration of the judges and the Home Office, we think it right to do so. For many years it has been known that after the conviction of a prisoner it is the duty of some responsible officer of police to tell the court what he knows about the prisoner as the result of inquiry, where it would involve great difficulty and expense to prove the facts by legal evidence.
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> . . . At times, no doubt, police officers on these occasions say more than they ought to say against prisoners; . . .

It is important to consider what the action of the court should be when it is suggested that some of the statements are not correct. If the prisoner wishes to deny anything, he can, especially if he is represented by counsel, do so at the time. In this case he had every opportunity of doing so, and it does not appear that he now wishes to contradict the statements, but merely to urge some extenuating circumstances. If the prisoner challenges any statement it is the duty of the judge to enquire into it; if necessary he should adjourn the matter, and if it is of sufficient importance he may require legal proof of it. Or he may ignore it, and if he does so he should state that he is not taking it into consideration. If the prisoner does not challenge the statements, the court may take them into consideration, and no injustice is likely to be done. Very often it is in the prisoner's interest that his antecedents should be stated: if it is not so, that is not the fault of the police, but of the antecedents.

Then there is the case of *R* v *Burton*.[3] There a police officer employed by a railway company gave evidence to the effect that police inquiries had definitely proved that the prisoner was responsible for the losses which have taken place owing to stealing on the railway. Humphreys J commented on this evidence thus:

That was a most improper statement to make. Either the police could prove that statement, in which case they ought to have prosecuted the appellant, or at least have given him an opportunity of asking for those offences to be taken into consideration, or they could not, in which case they ought not to have invited the presiding judge to increase the appellant's sentence in respect of felonies with which he had never been charged, and therefore had never had an opportunity of disproving.

In *R* v *Van Pelz*,[4] the prisoner was committed for larceny and was sentenced to 15 months imprisonment. Before sentence was passed a police officer gave evidence. He stated the age of the accused and the main details of her life for some 10 or 12 years. He then went on to describe her in colourful terms as a prostitute, an associate of convicted thieves, an adventuress, a very dangerous woman indeed, completely unscrupulous and for many years past living entirely on her wits. Viscount Caldecote CJ delivering the judgment of the Court of Criminal Appeal had this to say at p 38:

The question which has exercised the minds of the court is an important one. Police officers are always called, or nearly always called, after conviction, to assist the court when it is considering the sentence to be passed on a convicted person.

The learned judge went on to enlarge on what was said in the *Campbell* case[2] and *Burton* case[3] aforesaid saying:

When a police officer is called to give evidence about a prisoner who has been convicted, he should in general limit himself to such matters as the previous convictions, if any, and antecedents of the prisoner, including anything that has been ascertained about his home and upbringing in cases where the age of the prisoner makes this information material. It is the duty of the police officer, we think, to inform the court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the court. Police officers should inform the court of anything in the prisoner's favour which is known to them, such as periods of employment and of good conduct. We have no reason to believe that this is contrary to the present practice of the police who constantly inform the court of matters which are in the prisoner's favour. We also think that it is the duty of counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner.

It must not be taken that we are attempting to lay down a rule in such wide, and, at the same time, such exact, terms as would cover every case. That would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observation I need to make is this, and I hope it is unnecessary. Nothing I have said is intended to affect in the least degree the right of the court to inquire into any matter on which the court itself thinks it right to ask for information.

I have to say with respect that the learned magistrate should have disregarded completely anything connected with the original charge against the accused. That charge was amended and it was to the amended charge that the appellant pleaded guilty. The original charge, namely, a charge of murder against the appellant, must be taken to have been withdrawn and the appellant treated as being wholly innocent of that charge.

The view I take is that it was not proper for the prosecuting officer in reply to the plea in mitigation to tell the court that the appellant was involved in secret societies and that the case involved the death of the complainant's friend which was a consequence of gang fight. These matters had nothing to do with the charge in respect of which the appellant pleaded guilty. What is more, the appellant did not admit to these matters being true nor did he appear to have been given an opportunity to answer thereto. These comments which were erroneously accepted as evidence on the part of the prosecuting officer, who did not give evidence, certainly had an effect on the mind of the court in passing the sentence and indeed the learned magistrate made reference to secret societies in his grounds of judgment and it is reasonable to infer that the judicial notice the learned magistrate thought fit to take in respect of secret society operations in that area might well have been triggered by comments on that subject by the prosecuting officer.

There was no factual basis for the learned magistrate to find, as he did, that the fight was started by the appellant or indeed how it started at all and what transpired during the fight. It is not known what part if at all the complainant took. It is not known for certain whether others were involved and if so how many and what they did. There was nothing from which it could be deduced

that there was a preconceived plan to which the appellant was privy, to cause injury to the complainant.

I regret I could find no basis for the learned magistrate not requiring a probation report on the appellant. At the time of the offence he was 18 years old. My perusal of the case law shows it has been repeatedly stated that in the case of a person of young age who is liable to be sentenced to a term of imprisonment, it is always desirable that a probation report on him be obtained. This was said more than 35 years ago by Bellamy J in *Tukiran bin Taib* v *PP*,[5] by Smith J in *Teh Yew Whatt* v *PP*,[6] by Ambrose J in *Tan Kah Eng* v *PP*[7] and by Chang Min Tat J, as he then was, in *Lim Yoon Fah* v *PP*.[8] I therefore asked for and obtained a probation report on the appellant.

A perusal of the National Registration Identity Card of the appellant which I called for disclosed that he was born on 26 May 1970. The probation report did not disclose anything adverse to the appellant.

Notwithstanding all this, the admitted fact remains that the appellant chased and stabbed the complainant with a knife in a public place. The medical report on the latter discloses that the wounds inflicted were severe. In the circumstances, I do not consider the sentence of 12 months imprisonment to be manifestly excessive. However, it is not known whether in imposing sentence the learned magistrate had in mind that the appellant was detained on 7 September 1988 when he surrendered to the police and remained in custody till 19 February 1989.

Accordingly, I am of the view that in the ordinary course of events the period of his detention should have been taken into consideration and deducted from the sentence of 12 months. If the sentence is to run from today he would have to serve a term of about 1 month and 18 days, so his counsel reckoned. But he has behaved himself to date and there seems to be no purpose at this stage in sending him to prison. However, I shall ensure that as far as possible he will not get into trouble again. I therefore order that the sentence of one year be set aside and there be substituted therefor a bond under s 294 of the Criminal Procedure Code, in the sum of $5,000 with two sureties for two years.

Order accordingly.

Solicitors: *Aiyathurai & Co.*

Reported by *S Surenthiraraj*

United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 149 OF 1981
ABU MANSOR J
31 JANUARY 1990

Civil Procedure — Judgment in default of defence — Interest on judgment debt in excess of statutory rate and extending beyond date of judgment — Whether judgment can be set aside ex debito justitiae — Rules of the High Court 1980, O 42 r 12

Contract — Interest on instalment payments — Variation of interest rates — Whether variation can be unilateral

The second defendant applied to set aside judgment in default of defence entered against him on the ground that the judgment debt, carrying interest at 15% pa until payment, was wrong and as such could be set aside ex debito justitiae. It was argued for the second defendant that 15% interest was incorrect as the guarantee on which the claim was based carried interest at 12% pa. It was also argued that before there could be a variation of the interest rate there should be a notice of variation. Further, interest should only be up to the date of judgment and be at the 8% rate thereafter. The plaintiff alleged that the interest rate had been varied to 15% and as such this became the new contractual rate. They also argued and showed authority for the view that post-judgment interest at the contractual rate is permissible if the contract provided for an independent covenant which was not extinguished by the judgment.

Held, allowing the second defendant's application:

(1) The plaintiff is not permitted to have interest at more than 8% pa after judgment. Allowing more than 8% interest after judgment is only permitted if there is a contractual agreement providing for that. Since the plaintiff entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% pa, the second defendant has a right ex debito justitiae to have the judgment set aside.

(2) As regards interest up to judgment, this should be at the contractual interest rate. It is clear that there should be a written notice given to the second defendant before interest can be varied. Upon the plaintiff failing to produce such a notice of variation up to 15%, and on the second defendant's allegation that he was given no notice, the second defendant has a plausible defence to this action.

(3) The second defendant was ordered to pay all costs in any event thrown away or incurred by the plaintiff, including solicitor and client costs to be taxed.

(4) Order was granted in terms of other consequential orders as regards entering appearance and a stay of all proceedings pending this application. This was only to take effect after settlement in full by the second defendant of all taxed costs, with liberty to the plaintiff to apply in the event of default by the second defendant in complying with or carrying out the terms granted to him to defend the action.

[Bahasa Malaysia summary

Defendan kedua telah memohon untuk mengenepikan penghakiman ingkar pembelaan yang dimasukkan terhadapnya atas alasan bahawa hutang penghakiman, yang membawa faedah 15% setahun sehingga pembayaran, adalah salah dan oleh